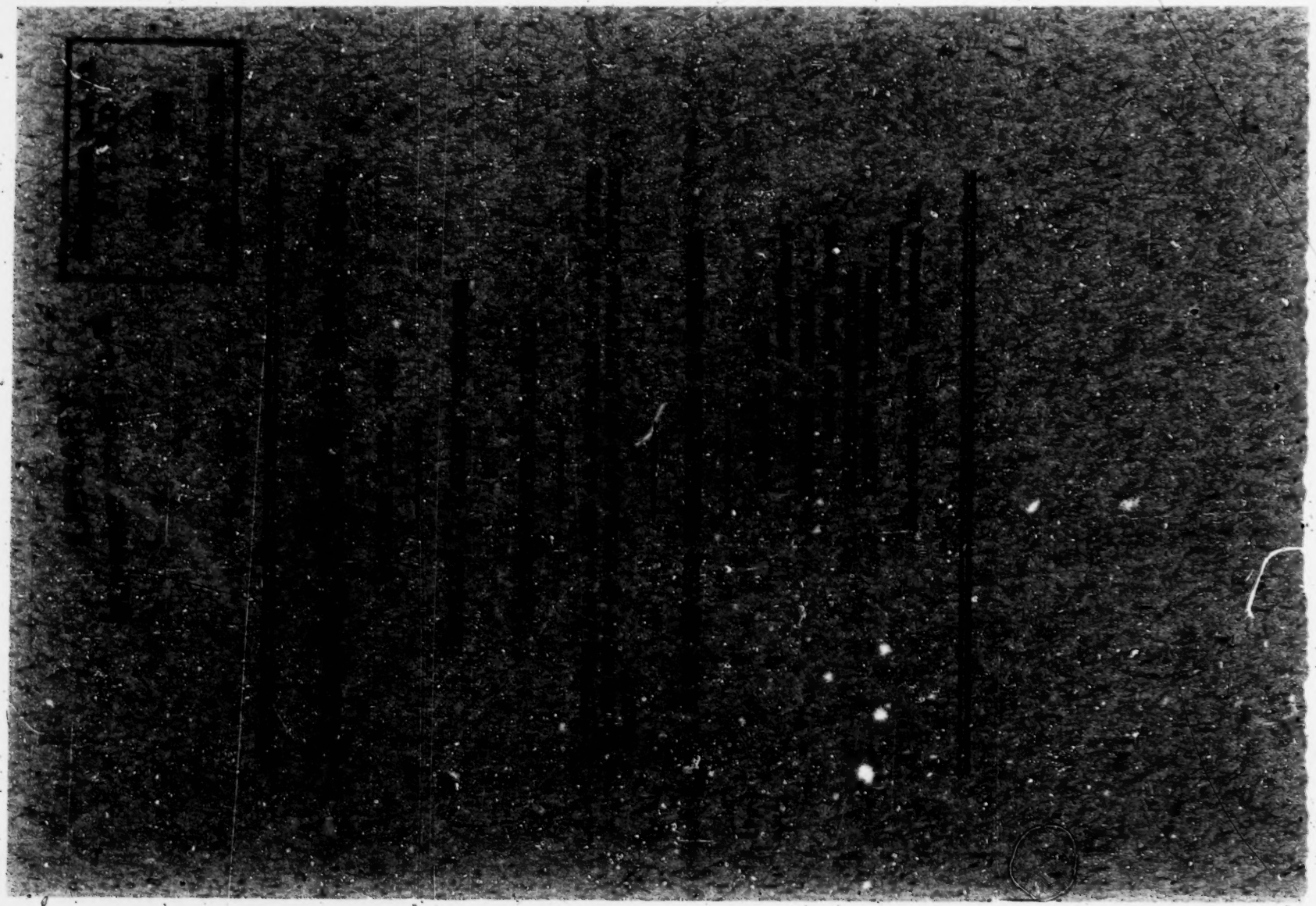

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634825—62

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 767

REGINALD C. JACKSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 26–27) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 11, 1962, and a petition for rehearing was denied on February 2, 1962. The petition for a writ of certiorari was filed on March 5, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the narcotics which petitioner threw away on the street were illegally seized.

2. Whether the trial court properly charged that possession of narcotic drugs was sufficient for conviction under 21 U.S.C. 174, unless it was explained to the satisfaction of the jury.

3. Whether the evidence was sufficient to sustain petitioner's conviction.

STATUTES INVOLVED

Section 4704(a) of Title 26 U.S.C. provides as follows:

> It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

Section 174 of Title 21 U.S.C. provides in pertinent part:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law * * * shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. * * *
>
> Whenever on trial for a violation of this section the defendant is shown to have or to

> have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

STATEMENT

Petitioner and Edward R. Holloway were indicted in the United States District Court for the District of Columbia on four counts charging narcotics offenses. Holloway was granted a severance and was separately tried on counts 1 and 2. Petitioner was thereafter tried before a jury on count 3, which charged that he purchased, sold, dispensed, and distributed narcotic drugs not in the original stamped package (26 U.S.C. 4704(a)), and on count 4, that he facilitated the concealment and sale of said drugs, knowing the same to have been unlawfully imported into the United States (21 U.S.C. 174) (J.A. 1–2).[1] Petitioner was convicted on both counts and sentenced to imprisonment for a period of one to three years on count 3 and for a period of five years on count 4, the sentences to be served concurrently (J.A. 10–11). The court of appeals affirmed (Pet. 26–27).

Before trial petitioner moved to suppress as evidence the narcotics referred to in counts 3 and 4 as the product of an invalid arrest (J.A. 3). This motion was denied, but was permitted to be renewed at the trial. A separate hearing out of the presence of the jury was held, following which the motion was again denied (T. Tr. 8–24). The evidence on the

[1] "J.A." refers to the joint appendix in the court of appeals, "T. Tr." to the trial transcript, and "H. Tr." to the transcript of the hearing on the pretrial motion to suppress evidence.

two hearings on the motion to suppress may be summarized as follows:

1. On October 24, 1960, about 8 p.m., Detectives Didone and Paul of the Narcotics Squad, Metropolitan Police, parked their squad car on 12th Street, Northwest, just north of its intersection with U Street. As they walked west across 12th street they noticed a car parked on the opposite side of the street, with the motor running and with Edward R. Holloway, a known narcotics user, at the wheel. Two other men in the car were later proved to be Carleton Bryant, in the front seat, and petitioner, in the rear seat. Inasmuch as users of narcotics are not eligible for a motor vehicle operator's permit in the District of Columbia, Didone approached the car on the driver's side, while Paul went to the other side (T. Tr. 9–11, 18, 27–28, 56–58, 62, 97).

Didone held out his badge to Holloway and said, "Police. Let me see your permit." The door on the driver's side of the car was locked, and Holloway refused to open the door or window. He then brought his right hand holding some white capsules up to his mouth. Didone yelled to Paul, "He is eating the caps." Paul opened the right-hand door and reached over Bryant to try to reach Holloway. Didone came around from the front of the car on the rider's side. At this juncture petitioner was seen to toss a white cigarette package through the open door to the sidewalk. Another officer happened to come along and the three officers subdued Holloway. Didone then picked up the "Viceroy" cigarette package from the sidewalk and found it to contain two cigarettes and

ten capsules of a powder which tests later showed to contain heroin hydrochloride (H. Tr. 63–64, 95, 97–98; T. Tr. 11–16, 29–31, 54, 98–99, 129). There were no narcotic stamps on the wrapper (T. Tr. 37). A single capsule of heroin was found in the front seat where Bryant had been sitting. All three occupants of the car were placed under arrest (H. Tr. 38, 95; T. Tr. 91–92).

2. Another officer took the three men to police headquarters and told the desk sergeant to book them under the Harrison Narcotics Act (T. Tr. 161). They were so booked, but by mistake this was crossed out and "Inv.," meaning investigation, was substituted. When this mistake was discovered, it was changed back to "Harrison Narcotics Act" (T. Tr. 219–221, 102, 117–118). An attorney who was called by petitioner testified that he had a telephone conversation with either Didone or Paul between 11:00 and 12:00 that evening and was told that petitioner was booked for investigation (T. Tr. 188–189). Both officers denied having any conversation with the attorney on the evening of the arrest (T. Tr. 211, 213).

Petitioner was booked at 8:46 p.m. Didone marked the cigarette package with his initials, field tested the contents of one of the capsules, and then turned the wrapper over to Sergeant Hayden to test for fingerprints about 9:00 p.m. (T. Tr. 63, 68). Hayden testified that the only print, which was clear enough to detect the markings, corresponded with the print of petitioner's middle finger of the left hand (T. Tr. 135, 138, 153).

Didone and Paul then put Holloway and Bryant through the normal routine for persons arrested for narcotics offenses, which took about an hour and included fingerprinting. Petitioner had to wait, as no other narcotics officers were then available. About 10:00 p.m. Didone came for petitioner. Didone asked petitioner for a cigarette and was handed a Viceroy package, which had been opened in the same unique manner as the Viceroy package which petitioner was seen to throw from the parked car earlier in the evening. Didone kept the package, but returned the cigarettes (T. Tr. 16–17, 68–69, 81–82, 92–94). Petitioner was released on bail at 11:30 p.m. (T. Tr. 229) and was arraigned the following morning. No statements made by him were introduced in evidence.

ARGUMENT

1. The trial court properly denied petitioner's motion to suppress as evidence the heroin which petitioner threw away while his co-defendant Holloway was being placed under arrest. First, petitioner has no standing to challenge the validity of Holloway's arrest. Even if that arrest were invalid this did not affect petitioner.[2] Therefore petitioner can question only the validity of the officers' action in approaching the car in which petitioner and Holloway were both sitting. This action of approaching the car was clearly not illegal.

[2] Under *Jones* v. *United States*, 362 U.S. 257, 266–267, petitioner could have objected to a search of the car as a guest. But such a search injures the guest because he is assumed to have some rights in the premises. Certainly, petitioner had no rights in the person of Holloway.

Second, even assuming that petitioner is in a position to challenge the validity of Holloway's arrest, there would be no basis for the challenge. Holloway, a known user of narcotics, ineligible for a driver's license, was seated at the wheel of the car with the motor running. This fact justified inquiry. The action of the officers in asking to see Holloway's driver's license was not an arrest, as petitioner argues; there was here not even the compulsion involved in bringing a moving car to a halt. There was mere inquiry by a general law enforcement officer as to a possible violation of the law. No steps were taken to arrest Holloway until he committed a felony in the presence of the officers by attempting to swallow capsules containing a white powder, which Didone, an experienced narcotics officer, justifiably believed to contain narcotics. The fact that Holloway was a known narcotics user and the fact that a number of capsules were taken simultaneously with the officers' inquiry made it improbable that Holloway was merely taking some medicine. There were thus ample facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information to warrant the belief that a felony was being committed in their presence. *Brinegar* v. *United States*, 338 U.S. 160, 175–176. Since the officers had probable cause, they could properly arrest Holloway.[3]

[3] The decision in *Taglavore* v. *United States*, 291 F. 2d 262 (C.A. 9), relied upon by petitioner (Pet. 13), where officers used alleged minor traffic violations as a pretext for obtaining an arrest warrant in order to search defendant for narcotics and then resorted to methods similar to those condemned in *Rochin* v. *California*, 342 U.S. 165, to gain possession of the narcotics, is clearly inapposite on its facts.

Petitioner's suggestion (Pet. 16) that doubt was cast upon the existence of probable cause by the circumstance that the desk sergeant at headquarters later changed petitioner's booking from the Harrison Narcotics Act to "Investigation" is without merit. This was merely a clerical error which was promptly corrected when one of the arresting officers discovered it. In any event, probable cause is determined as of the time of the arrest and is unaffected by subsequent events. *Byars* v. *United States*, 273 U.S. 28; *United States* v. *Di Re*, 332 U.S. 581.

Third, even if we assume that petitioner had standing to challenge Holloway's arrest and that the arrest was in fact invalid, the seizure of the narcotics was perfectly lawful. In *Hester* v. *United States*, 265 U.S. 57, the defendants dropped bottles of whiskey in a field after an officer had fired his pistol. This Court held, in an opinion by Mr. Justice Holmes, that there was no illegal search and seizure because "there was no seizure in the sense of the law when the officers examined the contents of each [bottle] after it had been abandoned. * * * [T]he special protection accorded by the Fourth Amendment to the people in their persons, houses, papers, and effects, is not extended to the open fields." *Id.* at 58–59. Here, petitioner threw away narcotics onto the street after officers attempted to subdue another person in the car. As in *Hester*, since petitioner abandoned the narcotics in the public streets, he cannot claim that the Fourth Amendment prevents of-

ficers from picking them up and introducing them in evidence against him.[4]

2. The trial court's charge that possession of narcotic drugs was sufficient to authorize conviction, unless explained to the satisfaction of the jury (T. Tr. 243), was in the language of 21 U.S.C. 174 and did not unconstitutionally deprive petitioner of any right: *Yee Hem* v. *United States*, 268 U.S. 178. It was accompanied by careful instructions as to the presumption of innocence and reasonable doubt (T. Tr. 244–248).

3. Petitioner's contention (Pet. 15–18) that the evidence is insufficient to sustain his conviction is based upon the claimed weakness of the evidence that a finger print on the Viceroy package containing narcotics corresponded to the print of the middle finger on petitioner's left hand.[5] It is clear, however, that

[4] In fact, this case is stronger than *Hester*. There, the bottles were thrown into a field owned by the father of one of the defendants and the officers were trespassing in the field. Here, the officers had a right to patrol the public streets.

[5] Petitioner also suggests (Pet. 18–19) that evidence was introduced at his trial which was obtained from petitioner during a period of unreasonable delay following his arrest in violation of this Court's decision in *Mallory* v. *United States*, 354 U.S. 449. No statements taken from petitioner, however, were introduced at his trial. Thus, it appears that petitioner's contention is directed at fingerprints which were taken only a little over two hours after his arrest and were used in order to prove that his fingerprint was on the Viceroy package containing narcotics. We submit that there was clearly no undue delay at the time petitioner was fingerprinted even if the subsequent delay in his arraignment until the following day was excessive. And even if petitioner's fingerprints had been taken during a period of undue delay in arraignment, it would in no way affect the form of petitioner's fingerprints.

there was ample evidence to sustain the conviction even without the identification of petitioner's fingerprints on the cigarette package containing narcotics. Two agents testified before the jury that they saw petitioner throw this package to the street (T. Tr. 30, 99). Thus, the government amply proved that petitioner had possession of narcotics, which under 21 U.S.C. 174 is ample for conviction.

In any event, the package containing the narcotics was initialed and turned over by the arresting officer to a fingerprint specialist immediately after the arrest. About an hour later, a second Viceroy package was procured by the officer from petitioner in order to check whether it had been opened in the same unique manner as the first package had been opened. The intimation that this package might have been the one which bore petitioner's fingerprint is hardly believable in view of the testimony of both Didone and Sergeant Hayden to the contrary. Moreover, this argument, as well as the others going to the credibility of this evidence, were matters for the determination of the jury.[6]

[6] Petitioner also contends (Pet. 19–20) that the trial court erred in denying him the opportunity to inspect the grand jury minutes in order to show why the case against Carleton Bryant was dropped. This Court has held, however, that a "particularized need" must be shown before the normal rule of secrecy of grand jury proceedings (Rule 6(e), F.R. Crim. P.) is overcome. *United States* v. *Procter & Gamble*, 356 U.S. 677, 683; *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 400. Petitioner has never shown such need existed. His claim is not that the grand jury transcript would show that the government's witness told conflicting stories as to his case. Instead, his desire for the transcript does not directly relate to his case at all; he wants to discover the basis on which the grand jury failed to indict another person arrested with him.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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